MV 98-5
Tax Type: MOTOR VEHICLE USE TAX
Issue: Rolling Stock (Vehicle Used Interstate For Hire)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	Case No. 93 ST 0000
	)	IBT No. 0000-0000
v.	)	NTL Nos. SF-000000000000000
	)	& SF-000000000000000
"AJAX" LEASING CO., INC.,	)	Administrative Law Judge
Taxpayer	)	Mary Gilhooly Japlon

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General John D. Alshuler, on behalf of the Illinois Department Of Revenue; Collins & Collins, by Michael R. Collins, on behalf of "Ajax" Leasing Co., Inc.

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by "Ajax" Leasing Co., Inc. (hereinafter "Ajax" or "taxpayer") of Notice of Tax Liability ("NTL") No. SF-000000000000000, issued by the Illinois Department of Revenue (hereinafter "Department") on December 11, 1992 in the amount of $180,563 for Use Tax, penalty and interest on the purchase of buses leased to various carriers for hire. Also at issue based upon a timely protest is NTL No. SF-000000000000000, issued by the Department on December 7, 1994 in the amount of $234,781 for Use Tax, penalty and interest due on the purchase of buses likewise leased to various carriers for hire. A hearing was held concerning both of the above-mentioned Notices of Tax Liability. At hearing Messrs. “Noah Beery”, “Dale Robertson”, “Tom Cruise”, “John Barrymore”, “Lee Marvin” and “John Belushi”, Jr. testified on behalf of the taxpayer. Specifically at issue is whether the buses leased to various carriers for hire pursuant to leases of one year or longer executed and in effect at the time of purchase of the vehicles qualify for the rolling stock exemption from Use Tax. The parties filed Stipulations of fact and issues (Joint Ex. No. 1). Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department’s *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Corrections of Returns, showing a total liability due and owing $126,792 for state Use Tax delinquencies and penalty for the period of January 1987 through August 1991, and RTA Use Tax delinquencies and penalty in the amount of $521 for the same period. (Dept. Group Ex. No. 1; Tr. pp. 9-11).
2. In addition, the Department’s *prima facie* case was established by the admission into evidence of the Correction of Returns for the period of July 1991 through November 1993 for state Use Tax deficiencies and penalty in the amount of $179,840. (Dept. Group Ex. No. 1; Tr. pp. 9-11).

3. Notice of Tax Liability No. SF-000000000000000 ("NTL-0000") was issued to the taxpayer, "Ajax" Lakes Leasing, on December 11, 1992 in the amount of $180,563 for Use Tax, penalty and interest for the period of January 1987 through August 1992. (Dept. Group Ex. No. 1; Stip. Ex. No. 1; Tr. pp. 9-11).

4. Notice of Tax Liability No. SF-000000000000000 ("NTL-0000a") was issued to the taxpayer on December 7, 1994 in the amount of $234,781 for Use Tax, penalty and interest for the period of September 1991 through November 30, 1993. (Dept. Group Ex. No. 1; Stip. Ex. No. 8; Tr. pp. 9-11).

5. NTL-0000 comprises the vehicles identified on the Global Taxable Exceptions (5 pages). (Joint Ex. No. 1, par. 4; Stip. Ex. No. 2).

6. Further identification of the vehicles at issue in NTL-0000 is contained on "Schedule A – Missing Vehicle Transaction Forms". (Joint Ex. No. 1, par. 4; Stip. Ex. No. 3).

7. The taxpayer submitted to the Department documents showing that it timely filed returns on the vehicles identified with the symbol "RF" to the far right on Stip. Ex. No. 4, as well as the vehicle identified as 11/87 Westway 1987 IHC IHVLNGM6HH489078 $29,272. (See: Stip. Ex. No. 2, p. 3. The $29,272 is part of the $49,272 entry). The Department agrees that this portion of NTL-0000, including interest and penalties, should be dismissed since it is barred by the statute of limitations. (Joint Ex. No. 1, par. 5).

8. The parties agree that the three (3) vehicles identified as follows should be dismissed based upon the taxpayer's production of returns showing that the tax was paid:

   7/90 Westway 1983 Ford IFDN60H50VA07670 $4,000
   7/90 Westway 1988 GMC IGDJ6PaBXJV526552 $8,000
   7/90 Westway 1988 GMC IGDG6P1BXJ515206 $8,000

(Joint Ex. No. 1, par. 6).

9. The entries on page 3 of the Global Taxable Exceptions (Stip. Ex. No. 2), i.e., “TAX: 62, ADJ. TYPE: 220, EXAM TYPE: 110 DETAIL 53,441.91” and “TAX: 62, ADJ. TYPE: 222, EXAM TYPE: 111 DETAIL 53,442” are duplicative and one of the assessments on the vehicle should not be included in NTL-0000. (Joint Ex. No. 1, par. 7).

10. The taxpayer leased the subject vehicles in NTL-0000 pursuant to leases of one year or longer executed and in effect at the time of the purchase of the vehicles to the following interstate carriers holding Certificates of Authority from the Interstate Commerce Commission as follows:

“Somewhere” School Bus Co., Inc. MC-00000
“Kladiddlehopper” School Bus Company, Inc. MC-00000
“Rufus” School Bus Lines, Inc. MC-00000

(Joint Ex. No. 1, par. 8; Stip. Ex. No. 5).

11. The sole issue concerning NTL-0000 is whether the taxpayer’s use of the buses other than those referred to in Stipulation paragraph nos. 5, 6, 7 and 8 qualify for the rolling stock exemption. (Joint Ex. No. 1, par. 11).

12. Regarding NTL-0000a, Stip. Ex. No. 9 sets forth the vehicles comprising said notice. (Joint Ex. No. 1, par. 15).

13. The taxpayer leased the vehicles comprising NTL-0000a pursuant to leases of one year or longer executed and in effect at the time of the purchase to the following interstate carriers holding Certificates of Authority from the Interstate Commerce Commission as follows:

“Freedom” School Bus Company, Inc.: MC-00000
“Somewhere” School Bus Co., Inc.: MC-00000

"Boone" Coach, Inc.: MC-00000
"Rufus" School Bus Lines, Inc.: MC-00000
"Pulaski" Bus Service, Inc.: MC-00000

(Joint Ex. No. 1, par. 16; Stip. Ex. Nos. 5 & 10)

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14. The sole issue concerning NTL-0000a is whether the taxpayer's use of the subject buses qualifies for the rolling stock exemption. (Joint Ex. No. 1, par. 21).

15. "Rufus" School Bus Lines, Inc. (hereinafter "Rufus") is located approximately two miles from the Indiana state line. (Tr. p. 20).

16. "Rufus" performs regular school transportation services, both intrastate and interstate. (Tr. pp. 30-31).

17. "Rufus" also provides interstate charter services for schools and the public. (Tr. pp. 30, 32).

18. "Rufus" engages in the charter business in addition to providing school transportation services to better utilize its buses. (Tr. p. 33).

19. Regular school transportation services consist of a two-hour commitment in the morning and two hours in the afternoon, 180 days a year. (Tr. p. 33).

20. During the school year, 188 buses are utilized per day; during the summer, "Rufus" utilizes 45 buses per day. (Tr. p. 33).

21. "Rufus" leased buses to "Anonymous" Baptist Church on Sundays during the audit period. (Tr. p. 34).

22. Drivers for the church would pick up children in Illinois and take them to Indiana for Sunday school. (Tr. p. 34).

23. "Rufus" advertised its charter services pursuant to ads placed in telephone directories supplied to various Indiana towns. (Tr. pp. 37, 46-47).

24. “Rufus” transports passengers to other carriers that travel interstate, such as train stations and airports. (Tr. pp. 47-48).

25. “Rufus” has relied upon the Department’s prior hearing determination granting it a Use Tax exemption. (Tr. p. 50).

26. “Rufus” executes a trip ticket for every charter (i.e., excursion) trip, but not for daily school transportation of students. (Tr. p. 52).

27. “Rufus” provides regular school route transportation services for 32 school districts, both private and public. (Tr. p. 59).

28. During the audit period, about 188 out of a fleet of 200 buses were on the road on a daily basis during the school year. (Tr. pp. 65-66).

29. During the school year, the buses provide both regular school route transportation services, as well as charter work. (Tr. p. 67).

30. During the summer months, “Rufus” buses provide transportation services for camps, as well as charter services. (Tr. p. 67).

31. “Pulaski” Bus Service is a school bus contracting company that provides both regular school route transportation services, as well as other types of transportation services that cross state lines. (Tr. pp. 89-90).

32. “Pulaski” has authority from the Interstate Commerce Commission to operate as an interstate carrier for hire. (Tr. p. 90).

33. “Pulaski” Bus Service advertised its charter services in the yellow pages during the taxable period at issue. (Tr. pp. 98-100; Taxpayer’s Ex. No. 6).

34. “Pulaski” services 12 school districts, all of which are located in Illinois. (Tr. pp. 101, 102).

35. At the beginning of the taxable period, there were approximately 100 buses in "Pulaski's" fleet; by the end of the taxable period in 1992, there were about 150 buses. (Tr. p. 101).

36. "Freedom" School Bus Company is a private contractor school bus company that transports children to and from school. (Tr. p. 104).

37. "Freedom" engages in activity trips, field trips and charter trips within Illinois, as well as out-of-state. (Tr. p. 104).

38. "Freedom" provided all activity transportation for the schools it serviced, including out-of-state transportation, during the taxable period.[1] (Tr. p. 104-106).

39. "Freedom" provides service for several public and private schools. (Tr. p. 106).

40. "Freedom" provides charter service to out-of-state locations, as well as transporting passengers to interstate transportation terminals, such as train stations or airports. (Tr. p. 107).

41. "Freedom" advertised its services in various yellow page directories, as well as in local papers during the period at issue. (Tr. p. 108; Taxpayer's Ex. Nos. 7 & 8).

42. In the year 1988, "Freedom" had 28 buses in its fleet; by 1992 there were 45 buses in the fleet. (Tr. p. 115).

43. Each bus in the fleet operates 180 to 200 days per year. (Tr. p. 115).

44. "Boone" provides school route transportation services during the school year, as well as transporting students on trips across state lines in accordance with contracts that the taxpayer has with the school districts. (Tr. pp. 118-119).

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[1] It should be noted that the taxable period for "Freedom" is September 1991 through November 1993. (NTL No. SF 000000000000000). Counsel for the taxpayer misspoke on the record when he described said period as being from 1987 through 1992.

45. “Boone” advertises its services in the yellow pages of various directories, as well as via promotional brochures. (Tr. p. 120).

46. During the period of 1987 through 1992, “Boone” Coach operated approximately 110 buses annually. (Tr. p. 125).[2]

47. During the school year (205 to 215 days per year), every bus was utilized each day. (Tr. p. 125).

48. During the summer months, an average of 25 to 35 buses were utilized daily. (Tr. p. 125).

49. “Somewhere” School Bus Co. is located in “Anonymous”, Illinois. (Tr. p. 127).

50. The business of Illinois School Bus consists of providing school route transportation service on a daily basis, as well as providing charter transportation for the school districts it services. (Tr. p. 127).

51. The charter services provided for the school districts consists of both intrastate trips, as well as trips across the state line to Wisconsin and Indiana. (Tr. p. 128).

52. “Somewhere” School Bus also provides charter services to the general public, both intrastate and out-of-state. (Tr. p. 129).

53. “Somewhere” School Bus defines a “charter” as any trip, that is not a school run, wherein a group of people is transported to and from a destination. (Tr. pp. 137-138).

54. A “school run” is defined as daily school route transportation performed for a school. (Tr. p. 138).

[2] Again, counsel for the taxpayer incorrectly described the taxable period pertaining to “Boone” Coach as being 1987 through 1992. In fact, the taxable period for said taxpayer is September 1991 through November 1993. (NTL No. SF 000000000000000). However, since it is not clear whether counsel intended to refer to the period 1987 through 1992, or rather, the taxable period, I choose to accept the time frame he specifically stated as the period he intended to reference.

55. “Somewhere” School Bus advertised its services in the yellow pages during the taxable period, as it does currently. (Tr. pp. 129-130; Taxpayer’s Ex. No. 9).

CONCLUSIONS OF LAW:

The Department prepared corrected returns (admitted into evidence as Dept. Group Ex. No. 1) for Use Tax liability pursuant to sections 4 and 5 of the Retailers’ Occupation Tax (hereinafter “ROT”) Act (35 **ILCS** 120/4). Said sections are incorporated into the Use Tax Act via section 12 thereof (35 **ILCS** 105/12). Section 4 of the ROT Act provides in pertinent part as follows:

> As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. … In the event that the return is corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.
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> Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy … in the name of the Department under the certificate of the Director of Revenue. … Such certified reproduced copy … shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 **ILCS** 120/4).

Section 5 of the ROT Act provides in pertinent part as follows:

> In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. ... Proof of such determination by the Department may be made at any

> hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 **ILCS** 120/5).

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on its purchase of various buses that were leased for the period of one year or longer to various bus companies. The taxpayer asserts that the purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

> Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:
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> ***
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> (b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce… . (35 **ILCS** 105/3-55).
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> Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 **ILCS** 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (*See*, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated and provided evidentiary proof that the lessees of the taxpayer received a grant of authority from the Interstate Commerce Commission (ICC) to operate as an interstate carrier of passengers for hire. (Joint Ex. No. 1, pars. 8, 16; Stip. Ex. Nos. 5, 10). Each lessee received its grant of authority prior to the taxable period that relates to that lessee.

Regarding the requirement that the interstate carriers must be “for hire”, the administrative rules provide that the “[t]he term ‘rolling stock’ includes the transportation vehicles of any kind of interstate transportation company for hire (… bus line, …), but the exemption does not contemplate vehicles:

> used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that its lessees are interstate carriers for hire using rolling stock that transports persons or property moving in interstate commerce. The certificates of authority alone are not sufficient to prove that the lessees are interstate carriers for hire. In First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358, 360 (4th Dist. 1980), the Court specifically held that "... the certificate of temporary authority, by itself, is insufficient evidence of interstate activity." In the case at bar, there was testimony regarding the taxpayer's adherence to the rules and regulations of the Interstate Commerce Commission. However, as the testimony in First National Leasing & Financial Corporation, *id.*, was not sufficient to prove interstate activity, testimony by the taxpayer's witness, likewise, is not adequate to establish that the taxpayer is an interstate carrier for hire. Rather, documentary evidence in the form of books and records is necessary.

Trip tickets or trip invoices pertaining to “Rufus”, “Somewhere”, “Pulaski” and “Boone” were tendered by the taxpayer as part of the stipulation exhibits. (Stip. Ex. Nos. 7, 12, 6, 14, 11 and 13, respectively). I will consider these trip tickets as adequate substantiation of taxpayer’s claim that those lessees are interstate carriers for hire, as the information stated on the invoices supports this assertion. No such documentary evidence was submitted, however, for “Freedom” or “Kladiddlehopper”. Therefore, it has not been established that “Freedom” and “Kladiddlehopper” were interstate carriers for hire during the period at issue. However, for the sake of argument, I will assume that the taxpayer has satisfied this requisite.

The taxpayer must next prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that the rolling stock (i.e., the vehicles operated by the lessees) transport, for hire, “persons whose journeys or property whose shipments originate or terminate outside Illinois” and therefore, qualify for the rolling stock exemption.[3]

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

[3] Chapter I, Section 130.340(a) of 86 Ill. Admin. Code provides that “… the Retailers’ Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce… .” Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, “… persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. …” Therefore, the rolling stock exemption itself is explicative of the phrase “interstate commerce”.

(c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.

(d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

It is important to note that there is a distinction between a vehicle traveling interstate, or across the state line, and "rolling stock moving in interstate commerce". The exemption is accorded to stock, carrying persons or property, the journeys of which originate or terminate outside Illinois. A state can tax the instrumentalities of interstate commerce, as long as two conditions are met: (1) an obvious nexus exists between the taxing state and the object(s) taxed; and (2) the tax is fairly apportioned, so that there is no unreasonable taxation. (First National Leasing & Financial Corp. v. Zagel, *supra*).

As stated previously, attached to Joint Exhibit No. 1 are stipulation exhibits consisting of trip tickets pertaining to all but two of the lessees. The absence of trip tickets for "Freedom" and "Kladiddlehopper" immediately necessitates a determination that neither of said bus companies qualifies for the rolling stock exemption. In regard to "Freedom", no documentary evidence was proffered in support of the claim of entitlement to the exemption. Rather, testimonial evidence was elicited from the general manager of "Freedom" School Bus Company. On the other hand, no evidence of any nature, documentary or testimonial, was proffered on behalf of "Kladiddlehopper". Case law is clear that testimony alone is not sufficient to prove interstate activity. Documentary evidence in the form of books and records is necessary. (First National Leasing & Financial Corporation v. Zagel, *id*.).

Stipulation Exhibit No. 6 consists of the documentary evidence pertaining to "Somewhere" School Bus Co. as it relates to NTL-0000 (January 1, 1987 through August 31, 1992). There are trip tickets or invoices for three buses: bus nos. 300, 301 and 302. Of the five invoices tendered for bus no. 300, four reflect trips taken in 1992 and one represents a trip taken in 1991. The trip that occurred in 1991 involved transporting passengers from Midway Airport to a location within Illinois, and returning the same group to Midway Airport later the same day. Of the four 1992 trips taken by bus no. 300, three involved either departing from Illinois and crossing the state line, or departing from out-of-state and coming into Illinois with a group of passengers. In each of these trips, the same driver returned the same passengers to their original pick-up point within the same day. One trip was a "drop-off only", wherein the bus picked up its passengers in Illinois and dropped them off in Michigan.

Regarding "Somewhere" School Bus no. 301, three invoices were presented. One of the invoices represents a 1991 trip, and two reflect trips taken in 1992. The 1991 trip invoice indicates that the bus was one of the three buses involved in the Midway pick-up/drop-off discussed above. The two 1992 trips were same-day trips, wherein a group of passengers was picked up in one state (Illinois), transported out-of-state for a brief duration, and then returned to the pick-up point on the same day, by the same driver. The one trip taken by bus no. 302 was another Midway drop-off/pick-up. Bus no. 302 was involved in this trip, along with bus nos. 300 and 301.

The statute certainly contemplates trips to or from transportation terminals as being within the exemption as it "applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire, persons whose journeys … originate or terminate outside Illinois". (35 **ILCS** 105/3-60). This certainly includes trips to and/or from transportation terminals, such as Midway Airport.

However, due to the lack of documentation evidencing the total number of trips taken by the three "Somewhere" School Bus buses, there is no way to determine whether the nine trip tickets tendered represent all of the trips taken by these buses. Given the scarcity of evidence of interstate trips (or any trips at all, for that matter), it is not possible to find that any of the buses owned by "Somewhere" School Bus would qualify for the exemption.

The taxable period pertaining to the "Somewhere" School Bus invoices in Stipulation Ex. No. 6 is January 1, 1987 through August 31, 1992. Two of the invoices tendered for bus no. 300 pertain to trip dates of September 22, 1992 and October 10, 1992. One of the three trips taken by bus no. 301 likewise occurred on September 27, 1992, again outside of the liability period. In the case of <u>Chicago and Illinois Midland Railway Company v. Department of Revenue</u>, 66 Ill. App.3d 397 (1st Dist. 1978), the Court held that it is the audit period that is relevant in the determination of whether the rolling stock exemption is applicable. The rolling stock must have moved in interstate commerce during the taxable period. In his Order in <u>National School Bus Service, Inc. v. Illinois Department of Revenue</u> (96 CH 13424) entered September 4, 1997, Judge John A. Ward commented parenthetically in regard to the period of time considered reasonable in determining the nature of the use of a vehicle. In <u>National</u>, there was one transaction (the purchase of buses in 1990), while the audit period was 1990 through 1993. Judge Ward commented that because there was only one transaction, the three year period allowed a consideration of the nature of the use of the buses beyond a reasonable period of time. Further, the Judge noted that when a shorter period is considered (i.e., the period in which the transaction took place), the use of the vehicles has less interstate character than supported by the longer period.

Applying the holding in Chicago and Illinois Midland Railway Company, *supra*, to the instant case results in no consideration or analysis of two of the five trip tickets proffered for bus no. 300 and one of the three invoices submitted on behalf of bus no. 301.[4] The trip tickets remaining as evidence of the "Somewhere" School buses exempt status are so inconsiderable as to necessitate the determination that the taxpayer has failed to prove that "Somewhere" School Bus qualifies for the exemption, and thus, the taxpayer/lessor likewise does not qualify.

Stipulation Ex. No. 14 consists of trip tickets reflecting travel across state lines during the period covered by NTL-0000a (September 1, 1991 through November 30, 1993). The summary sheet that precedes the invoices in Stipulation Ex. No. 14 provides that 17 Illinois buses are at issue. However, no invoices at all were tendered for eight of those buses (bus nos. 176, 177, 178, 179, 180, 181, 318 and 319). Regarding bus no. 320, five invoices were tendered, all outside of the taxable period. Four trip tickets were presented for bus no. 321, two of which were for trips taken in 1993, and two for trips outside of the taxable period. The invoices offered for bus nos. 322, 323, 325, 326 and 327 were also dehor the taxable period, and therefore, of no consequence. In regard to bus no. 324, two invoices were tendered for trips in 1993. The remaining seven invoices presented for this bus are for trips that occurred outside of the taxable period. Only three

[4] The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, *id*., is pertinent to this matter in that the exemption is claimed by the taxpayer at the time of purchase. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the bus, by happenstance, for an exempt purpose six months, eight months, one or two years later.

invoices were offered regarding bus no. 328, two for trips taken in 1993, and one for a trip that occurred dehor the taxable period.

There are two Notices of Tax Liability and two taxable periods in regard to “Rufus” School Bus Lines, Inc.: NTL-0000 relates to January 1, 1987 through August 31, 1992, and NTL-0000a pertains to September 1, 1991 through November 30, 1993. “Rufus” identified sixteen buses for which it tendered trip tickets relating to NTL-0000. By far, most of the invoices reflect “same day” trips as discussed previously. These were trips wherein the bus crossed the Illinois state line into a neighboring state, such as Indiana, Wisconsin or Michigan. A few of the trips were “drop off” or “pick up” only trips. That is, the bus took the passengers only one way, for example, to their destination in a neighboring state or to a point in Illinois, if the trip originated out of state (“drop offs”). Alternatively, the bus could have picked up its passengers in a neighboring state or returned them to their origination point in Illinois, or picked them up in Illinois and returned them to their out of state origination point (“pick ups”). In a few instances, the summary sheet, wherein the bus numbers are identified along with trip tickets pertaining to the bus, provides that a particular invoice was produced, but I was unable to locate the invoice, and therefore, could not credit the particular bus as having taken the trip.

The details of trips taken by “Rufus” buses relating to NTL-0000 are as follows:

Bus no. 841: two trips within the taxable period, one occurring in 1990 and the other in 1991.

Bus no. 842: two trips within the taxable period, one in 1991 and the other in 1992. No information was provided for a third trip ticket listed on the summary sheet.

Bus nos. 844, 849, 837, 838, 834 and 845: only one invoice was provided relating to these buses. Said trip ticket pertains to a November 1990 billing sent to “Anonymous” Christian School. Only one service date in that month is reflected for each bus.

Bus no. 848: seven trips within the taxable period, three occurring in 1991 and four in 1992, one of which was a trip to O’Hare Airport. It is to be noted that one of the trips for which a trip ticket was provided was outside of the taxable period.

Bus no. 847: six trips within the taxable period.

Bus no. 828: one invoice reflecting a billing to “Anonymous” Baptist Church dated September 20. However, the year is not visible.

Bus no. 831: 60 trips taken within the taxable period (23 in 1990, 26 in 1991 and 11 in 1992), two trips outside the audit period, and two invoices provided that do not relate to bus no. 831.

Bus no. 830: an invoice was provided reflected a December billing to “Anonymous” Christian Church for one date in December 1989.

Bus no. 829: no invoice could be located, although the summary sheet reflects that one invoice was tendered.

Bus no. 832: although the summary sheet reflects that seven invoices were provided, only one ticket could be located, and on that ticket the date of service was not clear.

Bus no. 839: one trip taken during the taxable period (1991).

Bus no. 836: one trip taken outside of the taxable period, and one trip reflected on the summary sheet for which no invoice could be located.

Bus no. 846: 29 trips within the taxable period (eleven in 1990, eleven in 1991 and seven in 1992), eight trips outside the period, one trip ticket with no date, and one trip listed on the summary sheet for which no ticket was located.

Bus no. 840: two trips within the taxable period (1991 and 1992), and one trip listed on the summary sheet for which no invoice was located.

Bus no. 835: two trips within the taxable period (1992), and one trip outside the period.

Bus no. 833: one trip which was outside the taxable period.

Bus no. 843: two trips reflected on the summary sheet, but for which no tickets were located.

Bus no. 827: four trips within the taxable period (1992), two trips outside of the period, and one trip for which no ticket was located.

Stipulation Exhibit No. 12 consists of trip tickets reflecting travel across state lines for “Rufus” buses for the period of September 1, 1991 through November 30, 1993. NTL-0000a assessed Use Tax on the purchase of these buses. The summary sheet preceding the invoices in Stipulation Exhibit No. 12 identifies 16 buses; however, no tickets were presented for four of those buses, nos. 646, 853, 859 and 864. Only one invoice was tendered for bus no. 851 reflecting a 1992 trip. Likewise, one invoice was offered regarding bus no. 862, identifying a trip taken in 1993. The only ticket produced for bus no. 854 reflects a trip taken outside of the liability period, and therefore, constitutes the equivalent of no ticket having been produced. Regarding bus no. 850, tickets were offered reflecting three trips taken in 1993, one ticket for which the year of the trip is not identified and five tickets for trips outside of the liability period. Regarding bus no. 852, trip tickets identify two trips having been taken in 1992, and three trips in 1993. Concerning bus no. 855, trip tickets specify one trip that transpired in 1993, and two trips outside of the liability period. Bus no. 856 took two trips in 1992, one trip in 1993 and two trips that were beyond the taxable period. One invoice was unclear as to the year of the trip, so it cannot be credited toward any interstate activity.

Documentary evidence in the form of trip tickets reflect that bus no. 857 took seven trips across state lines in 1992 and eight trips across state lines in 1993. Said bus took four trips outside of the liability period, one trip in December 1993 and three trips in 1994. In addition, two invoices were unclear, so it cannot be determined in what year the trips occurred. The invoices propounded for bus no. 858 consists of five trip tickets reflecting 1992 trips, three tickets representing trips taken in 1993, four trips outside of the liability period, and two invoices that cannot be deciphered regarding the trip dates. The evidence rendered for bus no. 860 is composed of six invoices relating to 1992 trips, 10 tickets identifying trips taken in 1993, one invoice reflecting a trip outside of the audit period, and one invoice manifesting an unclear date of service. Trip tickets submitted on behalf of "Somewhere" School Bus no. 861 evidence four 1992 trips, 15 1993 trips, and six trips outside of the taxable period. From the documentary evidence submitted on behalf of bus no. 863, it is evident that said bus took 12 interstate trips in 1992, seven trips in 1993, and two trips beyond the taxable period. Two invoices were presented wherein no year was listed, and two invoices were unclear as to the year of the trips.

Also at issue in the instant case is the purchase of three buses by "Pulaski" School Bus: bus nos. 406, 402 and 405. Stipulation Ex. No. 11 comprises the documentary evidence regarding "Pulaski". Only one ticket was presented for bus no. 406, and one ticket was proffered for bus no. 405, also. Two tickets were produced regarding bus no. 402. It is noteworthy that each of the trip tickets represents trips taken in 1994, while the taxable period represented by NTL-0000a is September 1, 1991 through November 30, 1993. The effect of producing evidence of trips that transpired dehor the audit period is the equivalent of producing no documentary evidence at all.

Lastly, Stipulation Ex. No. 13 comprises the evidence reflecting trips across state lines taken by "Boone" Coach buses during the period of September 1, 1991 through November 30, 1993. Although 17 buses are set forth on the summary sheet preceding the trip invoices in said exhibit, no tickets at all were tendered for six of those buses: bus nos. 352, 101, 353, 354, 355 and 356. The invoices presented for bus no. 212 reflect two trips in each of 1992 and 1993, and two trips outside of the pertinent period. Regarding bus no. 224, two trips were taken in 1992, three trips in 1993, and eight trips beyond the applicable period. Concerning bus no. 223, six trips were taken in 1992, one trip in 1993 and three trips outside of the taxable period. One invoice was tendered that was unclear as to the year of the trip and therefore cannot be considered. Evidence was tendered reflecting that bus no. 225 made three trips in both 1992 and 1993, six trips outside of the taxable period and one trip wherein the year is not clear from the document. Bus no. 313 made three trips in both 1992 and 1993, while bus no. 217 made three trips in 1992, and one trip outside of the pertinent period. One of the tickets listed as pertaining to bus no. 217 on the summary sheet does not relate to said bus. Trip tickets offered for bus no. 215 reflect one trip in both 1992 and 1993, and six trips dehor the audit period. Bus no. 216 made two trips in 1992 and one trip outside the period at issue, while bus no. 218 made four trips in 1992. The evidence further suggests that bus no. 220 made two trips in 1992 and one trip outside of the applicable period, while bus no. 219 made three trips in 1992.

All of the trip tickets proffered by the taxpayer on behalf of its various lessees identify trips across the state line. There is no evidence, documentary or otherwise, which reflects intrastate charter trips, as well. Since there was testimony that the buses do charter work for the school districts they service, it seems reasonable to conclude that not all charters are interstate in nature. Certainly, there are school charters that occur within this state, such as various athletic activities. Without this additional information, however, it is not possible to determine how many interstate trips any bus took in any year compared to the total number of trips taken by the same bus in the same year. There is evidence that a few of the trips taken by various buses involved overnight stays, as well as trips to and/or from the airport. Again, without the ability to compare these types of excursions with all trips engaged in by any individual bus, it is not possible to make the determination that the taxpayer leased buses that moved in interstate commerce to a degree sufficient to warrant the applicability of the exemption.

There are additional concerns regarding "Rufus" buses. There was testimony that "Rufus" has specific intrastate authority to work for the "Anonymous", Indiana Park District, which allows "Rufus" to provide transportation services for Indiana residents. Due to the total lack of documentary evidence to support this assertion in general, let alone specific evidence regarding the quantity of such work during the applicable periods, this oral representation cannot be considered. There was also testimony regarding "Rufus's" school route transportation services for "Anonymous" Christian School, which has students who live in Indiana. However, the only evidence supporting

“Rufus’s” venture into Indiana on a regular basis to bring students to an Illinois school is one invoice dated November 1990. The billing applies to six buses, with one date of service in November 1990 applying to each bus. This scant evidence is not sufficient to support a determination that the exemption applies. In addition, the testimony regarding “Rufus’s” lease of its buses to the “Anonymous” Baptist Church on Sundays during the audit period was not supported by evidence substantiating the alleged extent of such out-of-state use.

In First National Leasing and Financial Corporation v. Zagel, *supra*, Justice Green stated in a concurring opinion that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed the state lines on an "infrequent and irregular basis". There was no bona fide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois. In the instant case, the evidence presented is insufficient to determine the percentage of trips taken by each bus at issue with passengers in route across state lines, or to conclude that the trips taken by each bus were at all conducted on a fixed schedule or with any degree of regularity. Also, for many of the buses there was no evidence at all of any trips taken during various years at issue. In addition, regarding years for which trip tickets were proffered, many of the buses took such a negligible number of trips that they could not be considered sufficient to qualify for the exemption by any standard. Furthermore, a substantial number of trips for which evidence was offered on behalf of the various buses were outside of the applicable taxable period. These trips cannot be considered at all.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 **ILCS** 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax. Herein, there is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. As sparse as they may be, given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Irregardless, the taxpayer presented no evidence that multistate taxation of any of its lessees was actual or probable. (*See*, Complete Auto Transit, Inc. v. Brady, *supra*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore, utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court, therefore, found that Burlington Northern's physical movement across state lines 13 percent of the time, combined with the interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.[5]

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that "[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances … ." This appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington court's determination that the preamble is meaningless and, therefore, merely superfluous. (*See, also,* Judge John A. Ward's findings in his Order of September 4, 1997 in the case of National School Bus Service, Inc. v. Illinois Department Revenue, 96 CH 13424).

Further, the Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock

[5] The taxpayer also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc., the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefore, qualifies for the exemption.

I find Time, Inc. to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright, 38 Ill.2d 272 (1967)). Time, Inc. simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation …" is a comment on the intent behind granting the exemption.

exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is … intertwined with its intrastate use… ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business. In the instant matter, I do not find that the evidence suggests that the business of any one of the lessee bus companies taken as a whole intricately intertwines intrastate and interstate movement.

Another issue to consider is whether the penalties assessed in this cause should be waived based upon reasonable cause. The taxpayer introduced evidence via an offer of proof that "Rufus" relied upon a previous Department hearing determination wherein "Rufus" was found to be entitled to the rolling stock exemption. "Ajax" is attempting to boot strap onto what only "Rufus" could argue as detrimental reliance. The taxpayer against whom the Notices of Tax Liability were issued is "Ajax" Leasing, not "Rufus". There is certainly no evidence, nor was there an offer of proof, regarding "Ajax's" reliance upon "Rufus"'s exemption, or even knowledge of "Rufus"'s exemption, at the time it purchased the buses it subsequently leased. "Ajax" has no standing to assert that it is entitled to a waiver of penalties.

Counsel for the taxpayer argues that the taxpayer offered evidence that the Department intentionally selected school bus companies with charter bus operations to purposely and intentionally discriminate against them by denying them the exemption. The taxpayer claims that this is a clear violation of the Fourteenth Amendment.[6] It must be noted that evidence of this nature was in fact never offered into evidence. Furthermore, in his brief, counsel for the taxpayer asserts that he noticed the Revenue Auditor to appear at the hearing, and that in previous cases she testified inconsistently regarding the Department's standard for granting or denying the exemption. It must be made clear that the taxpayer never attempted to call the auditor as a witness in this proceeding. In a further example of confusing the issues, counsel claims in his brief that the taxpayer offered evidence showing that the auditors did not know how the Department determined taxability under the exemption. Again, no evidence of this nature was offered. Rather, the taxpayer offered evidence regarding a previous Department hearing determination concerning "Rufus", which was not allowed into evidence. However, the taxpayer was allowed to make an offer of proof in this regard.

When granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1995)). In the case at bar, "Ajax" Leasing Co., Inc. has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the bus purchases.

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[6] The Fourteenth Amendment of the Constitution of the United States provides, *inter alia*, that no State shall "deprive any person of life, "Freedom", or property, without due process of law; nor deny to any

RECOMMENDATION:

It is my recommendation that Notices of Tax Liability Nos. SF-00000000000000 and SF-000000000000000 be affirmed in their entirety.

Enter: ___________________________

Administrative Law Judge

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person within its jurisdiction the equal protection of the laws."